

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GEN ADS, LLC, et al.,

Plaintiffs,

v.

ANDREW BREITBART, et al.

Defendants.

CASE NO. C06-137JLR

ORDER

I. INTRODUCTION

This matter comes before the court on a motion to dismiss from Defendants Andrew Brietbart, Susannah Breitbart, and their marital community (collectively, “the Moving Defendants”) for lack of personal jurisdiction (Dkt. # 14). The court has considered the parties’ briefing and accompanying declarations and finds the matter appropriate for disposition on the papers and without oral argument. For the reasons stated below, the court GRANTS in part and DENIES in part the motion to dismiss.

II. BACKGROUND

California resident Andrew Breitbart is a principal of Breitbart.com, LLC (“Breitbart.com,” f/k/a Breitbart.com, Inc.), which owns and operates a website (www.breitbart.com) that attracts significant Internet traffic from the popular online news

1 source, “The Drudge Report.” Seeing great revenue potential based on the number of
2 visitors to the website, in September 2005, three parties to the present litigation
3 contracted to form an internet advertising firm, Plaintiff Gen Ads, LLC (“Gen Ads”).
4 The three signatories to the contract (“the LLC Agreement”) included: Plaintiffs Cartmell
5 Holdings, LLC (“Cartmell”) and Hillstrom Equities, LLC (“Hillstrom”), and Defendant
6 Breitbart Holdings, Inc. (“Breitbart Holdings”). In early November 2005, the newly
7 formed Gen Ads entered into an exclusive advertising services agreement (“Advertising
8 Agreement”) with Breitbart.com, whereby Gen Ads agreed to arrange for all advertising
9 on the website. Both the LLC Agreement and the Advertising Agreement contain forum
10 selection clauses designating Washington as the proper forum for any dispute arising out
11 of the respective agreements.
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13 Mr. Breitbart signed the LLC Agreement on behalf of Breitbart Holdings and the
14 Advertising Agreement on behalf of Breitbart.com. Today, Mr. Breitbart is the CEO and
15 President of Breitbart Holdings. Defs.’ Mot at 5. At the time he signed the LLC
16 Agreement, however, Breitbart Holdings had not incorporated under such name; rather
17 Mr. Breitbart was affiliated with Breitbart.com, Inc. In any event, some months after Gen
18 Ads formed, Mr. Breitbart filed a certificate of amendment changing the name of
19 Breitbart.com, Inc. to Breitbart Holdings. Plaintiffs characterize Mr. Breitbart’s signature
20 on the LLC Agreement as an act on behalf of a non-existent entity (thus, triggering
21 personally liability), while the Moving Defendants consider Breitbart Holdings to have
22 undergone nothing more than an innocuous name change.
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25 Sometime during negotiation and execution of the LLC Agreement, Breitbart.com
26 entered into an agreement with third-party news source, Reuters, to post links to Reuters’
27 stories from the Breitbart.com website. According to Plaintiffs, Mr. Breitbart entered
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1 into negotiations with Reuters to generate this “advertising” revenue at the same time he
2 was arranging for Gen Ads’ right to exclusive advertising.

3 Gen Ads, Cartmell, and Hillstrom filed suit against Breitbart.com, Breitbart
4 Holdings, and Mr. and Mrs. Breitbart and their marital community. As to Mr. Breitbart,
5 Plaintiffs allege that he violated the Advertising Agreement, breached his fiduciary duty,
6 and committed fraud. Plaintiffs also claim that Mr. Breitbart has used Gen Ads’
7 copyrighted code in placing advertisements on the Breitbart.com website. Plaintiffs
8 contend that Mr. Breitbart engaged in such acts for the benefit of his marital community,
9 and thereby name Mr. and Mrs. Breitbart and their marital community as Defendants in
10 this action. The Moving Defendants now seek dismissal of the action against them for
11 lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2) (“Rule 12(b)(2)”). The
12 non-Moving Defendants, Breitbart.com and Breitbart Holdings, do not contest personal
13 jurisdiction for the purposes of this lawsuit.
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15 **III. DISCUSSION**

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17 When a defendant moves to dismiss a complaint for lack of personal jurisdiction,
18 the plaintiff must make a prima facie showing of personal jurisdiction to survive the
19 motion. Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd., 328 F.3d 1122,
20 1128-29 (9th Cir. 2003). The plaintiff must provide evidence that, if believed, would
21 support the court’s exercise of jurisdiction over the defendant. Id. at 1129. The court
22 need not accept the plaintiff’s bare allegations if the defendant controverts them with
23 evidence. See AT&T Co. v. Compagnie Bruxelles Lambert, 94 F.3d 586, 588 (9th Cir.
24 1996). If both parties provide evidence supporting different versions of a fact, however,
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1 the court must resolve competing inferences in the plaintiff's favor. Harris Rutsky, 328
2 F.3d at 1129.¹

3 Where no applicable federal statute addresses the issue, a court's personal
4 jurisdiction analysis begins with the "long-arm" statute of the state in which the court sits.
5 Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1123 (9th
6 Cir. 2002). Washington's long-arm statute extends the court's personal jurisdiction to the
7 broadest reach that the United States Constitution permits. Shute v. Carnival Cruise
8 Lines, 783 P.2d 78, 82 (Wash. 1989). Therefore, this court determines whether
9 exercising jurisdiction over the Moving Defendants comports with federal due process.
10 Glencore Grain, 284 F.3d at 1123. Federal due process requires that nonresident
11 defendants have sufficient minimum contacts with the forum state such that the exercise
12 of jurisdiction will not offend "traditional notions of fair play and substantial justice."
13 Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

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15 A court can exercise its power over a non-resident defendant (absent the
16 defendant's consent) only if it has specific or general jurisdiction. Bancroft & Masters,
17 Inc. v. Augusta Nat'l, Inc., 223 F.3d 1082, 1086 (9th Cir. 2000). Where a defendant has
18 "substantial" or "continuous and systematic" contacts with the forum state, it is subject to
19 general jurisdiction, and can be haled into court on any action, even one unrelated to its
20 contacts. Id. If a defendant is not subject to general jurisdiction, it may be subject to
21 specific jurisdiction if the action upon which it is sued arises from its contacts within the
22 forum state. Id.

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26 ¹A preponderance of evidence standard applies where the court holds an evidentiary
27 hearing to address personal jurisdiction. Data Disc, Inc. v. Sys. Tech. Assocs., Inc., 557 F.2d
28 1280, 1284-85 (9th Cir. 1977). Neither Plaintiffs nor the Moving Defendants have requested an
evidentiary hearing.

1 The Ninth Circuit applies a three-part test to determine specific jurisdiction.
2 Specific jurisdiction exists if (1) the defendant has performed some act or consummated
3 some transaction within the forum or otherwise purposefully availed himself of the
4 privileges of conducting activities in the forum, (2) the claim arises out of or results from
5 the defendant's forum-related activities, and (3) the exercise of jurisdiction is reasonable.
6 Id. at 1086. If the plaintiff meets his burden on the first two parts of the test, the burden
7 shifts to the defendant to satisfy the third part by presenting a “compelling case” that the
8 exercise of jurisdiction is unreasonable. Schwarzenegger v. Fred Martin Motor Co., 374
9 F.3d 797, 802 (9th Cir. 2002) (citation omitted).

11 **A. Jurisdiction Over the Marital Community**

12 At the outset, the court notes that although community property can be held liable
13 for an obligation incurred by one spouse for the benefit of the community, the marital
14 community is not a separate legal entity from the spouses. Cf Bortle v. Osborne, 285 P.
15 425, 427 (Wash. 1930) (“[W]e have never held that a partnership or a marital community
16 is a legal person separate and apart from the members composing the partnership or
17 community.”). Under California law,² jurisdiction over one spouse binds the community
18 assets. Cal. Fam. Code § 910 (“community estate is liable for debt incurred by either
19 spouse . . . regardless of whether one or both spouses are parties . . . to a judgment for the
20 debt.”). Thus, it is unnecessary to discuss personal jurisdiction as it relates to the marital
21 community; rather, the court assesses each spouse’s contacts with the forum state.
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25 ²In this case, California law governs the question of whether the marital community is
26 bound by the business negotiations and contracts executed by one spouse. See G.W. Equipment
27 Leasing, Inc. v. Mt. McKinley Fence Co., 982 P.2d 114, 117-118 (Wash. App. 1999) (applying
28 Arizona law to determine whether the marital community would be bound by an Arizona spouse’s
guaranty agreement).

B. Specific Jurisdiction Over Andrew Breitbart

Plaintiffs allege that Mr. Breitbart is a party to the contract, subject to the forum-selection clause, because he acted in his individual capacity by negotiating and signing a contract on behalf of a non-existent corporate entity (Breitbart Holdings, prior to incorporation). Plaintiffs also allege that Mr. Breitbart breached his fiduciary duty to Gen Ads and made false representations in contract negotiations when, at the same time he negotiated with them, he held discussions with Reuters for advertising on the Breitbart.com website. The Moving Defendants contend that, although Mr. Breitbart signed the contracts on behalf of the two companies that share his name, he is not subject to this court's jurisdiction because he is not a party to the contracts and because he conducted his business inside and from California, not Washington.

Plaintiffs have succeeded in making out a prima facie case of specific jurisdiction over Mr. Breitbart. As to the first prong, the court is persuaded that Mr. Breitbart's conduct was such that he should have reasonably anticipated being haled into a Washington court. Mr. Breitbart personally negotiated and signed a contract with a Washington company (Cartmell) to form another Washington company (Gen Ads), disputes over which the contracting parties agreed would be governed by Washington law and litigated before a Washington tribunal. See Burger King v. Rudzewicz, 471 U.S. 462, 472 (1985) (choice-of-law clause is a factor to consider when making jurisdictional determinations); Heller Fin., Inc. v. Midwhey Powder Co., 883 F.2d 1286, 1290-92 (7th Cir. 1989) (forum-selection clause presumes a party's consent to personal jurisdiction).

Even if the court assumes (for now) that Mr. Breitbart is not a party to the contract, but that he acted simply as an agent of Breitbart Holdings or Breitbart.com, the court finds sufficient minimum contacts. The Moving Defendants are correct that jurisdiction over a corporation does not necessarily mean that the court has power over

1 the entity's nonresident officers, directors, agents or employees acting in their official
2 capacities. Davis v. Metro Prods., Inc., 885 F.2d 515, 520 (9th Cir. 1989) (discussing
3 generally the common-law "fiduciary shield" doctrine). At the same time, however, the
4 corporate form does not automatically shield a nonresident officer or agent, like Mr.
5 Breitbart, who otherwise has sufficient contacts with the forum state. Id. at 521. At the
6 very least, as to Plaintiffs' causes of action for fraud and breach of fiduciary duty, it is
7 Mr. Breitbart's alleged wrongdoing that is at issue, not the mere fact that he signed a
8 contract as President, member, promoter or in some other capacity related to Breitbart
9 Holdings or Breitbart.com. See Bancroft, 223 F.3d at 1087 (personal jurisdiction exists
10 where defendant engages in "allegedly wrongful conduct targeted at a plaintiff whom the
11 defendant knows to be a resident of the forum state"). Stated another way, Mr. Breitbart
12 is not being haled into a Washington court as a result of "random, fortuitous, or
13 attenuated contacts, or of the unilateral activity of another party or third person," Burger
14 King, 471 U.S. at 475, but by allegations related to his own course of action directed at
15 Gen Ads, a Washington company. The court finds unavailing the Moving Defendants'
16 argument that personal jurisdiction is improper because Mr. Breitbart has not visited
17 Washington since he was a young boy. A defendant's physical presence in the state is
18 not required, as long he "purposely directed" efforts toward the forum. Burger King, 471
19 U.S. at 476.

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22 The second prong of the Ninth Circuit test is easily met. To establish that a claim
23 "arises out of forum-related activities," a court must determine "whether [a plaintiff's]
24 claims would have arisen but for [a defendant's] contacts with" the forum state. Doe v.
25 Unocal Corp., 248 F.3d 915, 924 (9th Cir. 2001). Here, the contact with the forum state
26 is Mr. Breitbart's alleged conduct related to negotiating contracts to form and partner
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1 with Gen Ads. The conduct surrounding the contracts form the basis of Plaintiffs'
2 complaint.

3 As to the third prong, Mr. Breitbart fails to make a “compelling case” that the
4 exercise of jurisdiction is unreasonable. Schwarzenegger, 374 F.3d at 802. The Ninth
5 Circuit has set forth a universe of factors for the court to consider in determining whether
6 the exercise of jurisdiction over a nonresident defendant satisfies the reasonableness test:
7 (1) the extent of the defendant’s purposeful interjection into the forum state’s affairs; (2)
8 the burden on the defendant; (3) conflicts of law between the forum and defendant’s
9 home jurisdiction; (4) the forum’s interest in adjudicating the dispute; (5) the most
10 efficient judicial resolution of the dispute; (6) the plaintiff’s interest in convenient and
11 effective relief; and (7) the existence of an alternative forum. Sinatra, 854 F.2d at 1199-
12 1201; Insurance Co. of North America v. Marina Salina Cruz, 649 F.2d 1266, 1270 (9th
13 Cir. 1981) (first setting out factors). The Moving Defendants do not address any of these
14 factors; rather they simply state that it would be unfair and inequitable for them to suffer
15 the inconvenience of defending this suit in Washington. Defs.’ Mot at 12; Reply at 11.
16 The court finds that Mr. Breitbart has not met his burden on the third prong and that
17 moreover, the balance of factors weighs in Plaintiffs’ favor.

18 Because the court has determined that it has personal jurisdiction over Mr.
19 Breitbart for the purposes of, at least, Plaintiffs’ claims of fraud and breach of fiduciary
20 duty, the court exercises its discretion to assert jurisdiction over Mr. Breitbart for the
21 remaining two causes of action: breach of contract and copyright infringement. See Corp.
22 v. Atlantic Embroidery, Inc., 368 F.3d 1174, 1181 (9th Cir. 2004) (court has discretion to
23 exercise pendent jurisdiction over claims in the absence of minimum contacts). The
24 breach of contract claim arises under the same common nucleus of operative fact as
25 alleged under the fraud and fiduciary duty claims. See id. Pendent personal jurisdiction
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1 as to the copyright claim is somewhat more tenuous; however, judicial economy and the
2 avoidance of piecemeal jurisdiction strongly weighs in favor of this court's exercise of
3 jurisdiction over this remaining cause of action. Accordingly, the court denies the
4 Moving Defendants' motion to dismiss for lack of personal jurisdiction over Mr.
5 Breitbart.

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7 **C. Jurisdiction Over Susannah Breitbart**

8 As to Mrs. Breitbart, Plaintiffs have not alleged any action on her part that would
9 evidence a contact with Washington State, nor for that matter, any conduct whatsoever
10 that relates to this lawsuit. Rather, Plaintiffs allege that Mr. Breitbart acted as an agent
11 for his wife in the course of his business dealings.

12 Under California law, it is not necessary to name both spouses in order to bind the
13 community estate. Reynolds & Reynolds Co. v. Universal Forms, Labels & Systems,
14 Inc., 965 F. Supp. 1392, 1396 (C.D. Cal 1997) (citing Cal. Fam. Code § 910). In
15 Reynolds, the court dismissed the wives of defendant-former employees from suit on a
16 Fed. R. Civ. P. 12(b)(6) motion because the plaintiff-employer had not stated any cause
17 of action against the wives, but rather named them solely to reach the community assets.
18 Id. at 1397. Although a different procedural posture than the instant matter, the Reynolds
19 case is instructive in that, applying California law, the court considered the actions of the
20 spouses separately from one another. The court noted that, although it would have
21 certainly allowed the wives to intervene as permissible parties had they been omitted
22 from suit, the court would not force the unwilling spouses to participate in the litigation
23 where no cause of action sounded against them individually. Id. By contrast, a federal
24 district court applying Arizona law – which *does* require joinder of both spouses to obtain
25 judgment against community property – exercised jurisdiction over a nonresident spouse
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1 on the theory that the husband acted as the wife's agent. Essex Engineering Co. v. Credit
2 Vending, Inc., 732 F. Supp. 311, 315 (D. Conn. 1990).

3 The court finds no justification for departing from the Reynolds rationale,
4 particularly where Plaintiffs provide no authority for the proposition that Mr. Breitbart
5 acted as Mrs. Breitbart's agent and that by virtue of this supposed relationship, the court
6 has jurisdiction over Mrs. Breitbart. Indeed, Plaintiffs rely on Washington's statutory
7 presumptions about community property liability and assert that, since California is also a
8 community property state, California law must have analogous rules. In doing so,
9 Plaintiffs not only fail to cite any California authority, but incorrectly focus on the
10 question of *liability* which this court considers a separate question from that of personal
11 jurisdiction. Further, there is no evidence that Mrs. Breitbart even knew or consented to
12 any of Mr. Breitbart's alleged business dealings. Without more, the court declines to
13 assert personal jurisdiction based on an out-dated presumption that an agency relationship
14 between two individuals exists simply because they are married. See Restatement
15 (Second) of Agency, § 22, comment b ("[n]either husband nor wife by virtue of the
16 relation has power to act as agent for the other"); see also Kesler v. Pabst, 273 P.2d 257,
17 260 (Cal. 1954) (reasoning that the mere existence of a family relationship did not
18 establish agency in context of negligence claim).

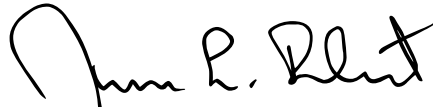
19 Moreover, as a general rule, courts consider personal jurisdiction as it relates to
20 each individual defendant. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S.
21 408, 416-17 (1984) ("unilateral activity of another party or a third person is not an
22 appropriate consideration when determining whether a defendant has sufficient contacts
23 with a forum State"). Thus, even if a unilateral act is done with a nonresident defendant's
24 knowledge or acquiescence, such contact is insufficient. See Kulko v. California
25 Superior Court, 436 U.S. 84, 93-94 (1978) (holding that no jurisdiction existed over
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1 defendant-father based on his mere acquiescence to allow child to live in California).
2 Against this backdrop, the court grants the Moving Defendants' motion to dismiss the
3 case against Mrs. Breitbart for lack of personal jurisdiction. See Magidow v. Coronado
4 Cattle Co., 504 P.2d 961, 966 (Ariz. App. 1972) (finding no personal jurisdiction over
5 California wife who had no contacts with forum state other than those arising from her
6 membership in marital community).
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8 IV. CONCLUSION

9 For the reasons stated above, the court holds that it has personal jurisdiction over
10 Mr. Breitbart, but does not have jurisdiction over Mrs. Brietbart. Accordingly, the court
11 DENIES in part and GRANTS in part the Moving Defendants' motion to dismiss (Dkt. #
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13 Dated this 5th day of June, 2006.
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16 JAMES L. ROBART
17 United States District Judge
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